MAR 29 1956
HAROLD B. WILLEY, C

In the

SUPREME COURT OF THE UNITED STATES

NOVEMBER TERM, 1955

No. 807

ORVAL CARR,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

CHARLES HILL JOHNS,
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Oklahoma City, Oklahoma;

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Oklahoma City, Oklahoma,

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March 28, 1956.

LITTLEBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. FO 5-6750

INDEX

	PAGE
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	2
Statutes Involved	3
Statement of the Case	3
Facts	5
Reasons for Granting the Writ	6
Conclusion	8

AUTHORITIES

CASES:

Boyd v. U. S., 116 U.S. 616	7
Taylor v. U. S., 286 U.S. 1	7
Trupiano v. U. S., 334 U.S. 699	7

CONSTITUTIONAL PROVISIONS:

Constitution of the United States, Amendments IV and V	2-3, 7

STATUTES:

Title 26, U.S.C.A., Secs. 2803, 3321, 2913	3
Title 28, U.S.C., Sec. 1254 (1)	2

INDEX CONTINUED PAGE

APPENDIX

Appendix A:

Opinion of the United States Court of Appeals for the Tenth Circuit, filed February 28, 1956 i

Appendix B:

Judgment and Order of Probation of the United States District Court for the Western District of Oklahoma, filed June 22, 1955 vii

Appendix C:

Statutes Involved, Set Out in Full viii

In the

Supreme Court of the United States

NOVEMBER TERM, 1955

No. .....

ORVAL CARE,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

Orval Care, petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on February 28, 1956.

OPINION BELOW

The case is reported in — F.2d — and is printed in Appendix A, *infra.*

JURISDICTION

The judgment sought to be reviewed was rendered and entered on February 28, 1956.

On March 9, 1956, an Order of the United States Court of Appeals, Tenth Circuit, was entered staying the mandate of the said Court for a period of thirty (30) days from February 28, 1956.

Jurisdiction of this Court is invoked under Title 28, U.S.C., Sec. 1254(1) (Appendix C).

QUESTIONS PRESENTED

1. The decision of the Court of Appeals, Tenth Circuit, limiting the protection of the Fourth Amendment to structures within the curtilage of an accused's home is in conflict with decisions of this Court.

2. The decision of the Court of Appeals, Tenth Circuit, in holding that the evidence in this case was legally obtained, and its failure to order the supression of said evidence, is in conflict with the decisions of this Court requiring a search warrant for the valid search of a stationary structure, where a reasonable opportunity to secure a warrant is shown.

CONSTITUTIONAL PROVISIONS INVOLVED

"AMENDMENT IV—SEARCHES AND SEIZURES

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S.C.A. Const. Amend. IV.

"AMENDMENT V—CAPITAL CRIMES; DUE PROCESS

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising

in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S.C.A. Const. Amend. V.

STATUTES INVOLVED

Title 26, U.S.C.A., Secs. 2803, 3321, and 2913: Possession of nontaxpaid spirits; removing and concealing nontaxpaid spirits with intent to defraud; and removing and concealing nontaxpaid spirits in a place other than a bonded warehouse.

The full text of applicable portions of these statutes is quoted in Appendix C., *infra*.

STATEMENT OF THE CASE

Petitioner was convicted upon a plea of "Not Guilty" and finding of "Guilty" by the District Court of the United States, Western District of Oklahoma on each of six (6) counts of the indictment for the offense of violations of Sections 2803, 3321, and 2913, Title 26, U.S.C.A. (two counts on each offense).

A copy of the Judgment and Order of Probation of the United States District Court for the Western District of Oklahoma is set out as Appendix B, hereto attached.

Petitioner appealed from the conviction and sentence (five years suspended) and alleges that the evidence upon

which he was convicted should have been suppressed upon petitioner's timely Motion, because such evidence was obtained by means of an illegal search and seizure in violation of petitioner's rights, protections, and immunities guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States.

Trial by jury was waived and the case submitted to the trial judge upon evidence produced on hearing of the Motion to Suppress and upon stipulations of additional facts (R. 6-9).

As stated by the Circuit Court (Appendix A), "The denial of the Motion to Suppress is crucial; for without the evidence secured in the search, the conviction cannot stand."

The search complained of was of a cave located in a two and one-half (2½) to four (4) acre mesh wire, hog-tight enclosure just back of petitioner's home.

Petitioner contends, first: That the cave was a stationary structure, even though below ground, and that a search warrant is a necessary prerequisite to a valid search of a stationary structure, even though there is probable cause to believe the structure is being used in violation of the law, where the search is not incident to an arrest and where there is a reasonably adequate opportunity to obtain a search warrant.

And second: That the search and seizure complained of was within the curtilage of petitioner's home, and required a search warrant on this additional ground.

The Circuit Court failed to consider the first grounds set out above and, in their opinion, sought to dispose of the case by holding that the cave was not within the curtilage.

Appellant asserts that the court erred in failing to consider and pass on his contention that a search warrant is a necessary prerequisite to search a stationary structure even though outside the curtilage, when there is an adequate opportunity to obtain a search warrant.

FACTS

The evidence shows that the so-called cave, as referred to in the Opinion of the Circuit Court, was actually a permanent man-made structure; that it was constructed in a ditch but that it had a heavy beamed ceiling, was totally closed at the lower end and was closed at the upper end by two heavy railroad car doors.

The evidence further shows that it was wired with electricity and electric lines, contained a water pump, a gasoline tank, a large gasoline burner, and other equipment commonly used in still. Petitioner claimed all of the articles found within the structure but denied that there was any whiskey located in the structure at the time of the search.

The uncontradicted evidence further shows that the Alcohol Tax Unit Agents of the Government, who conducted the search complained of, had had petitioner's premises under suspicion for many weeks. On November 15, 1954, they went to petitioner's ranch and searched a large portion of his ranch for a still. Petitioner was at home at that time. The Alcohol Tax Unit Agents claim that he granted permission to search at that time. Petitioner de-

nies that he gave permission to search his premises then or at any other time. The officers spent several hours looking over much of petitioner's ranch on November 15, 1954, but they did not complete the search.

The Alcohol Tax Unit Agents returned to the area in which petitioner's ranch is located on December 3, 1954. That evening they found 695 gallons of whiskey in a plum thicket on a tract of land that adjoins petitioner's ranch.

On the morning of December 4, 1954, they returned to petitioner's ranch home without a warrant. They discovered that neither petitioner nor any one else was upon the premises. They then proceeded to search a two and one-half (2½) to four (4) acre hog-tight, mesh wire fence just behind petitioner's home and discovered therein what the Government terms a cave, and petitioner asserts is a permanent structure. No one was in or about this cave or structure. It could not be seen into nor entered without removing the heavy doors at its upper end. The Government concedes that it was not a still set up or in operation. It is conceded that if a search warrant was necessary the Government's case failed.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in sustaining the trial court's action in denying petitioner's Motion to Suppress and in limiting the protections of the Fourth Amend-

ment to the curtilage of an accused's home is in conflict with the following authorities.

—*Taylor* v. *U.S.*, 286 U.S. 1;

Trupiano v. *U.S.*, 334 U.S. 699;

United States Constitution, Amendment IV.

The decisions in the above cited cases are not limited by considerations of curtilage.

The intimate relation between the Fourth and Fifth Amendments of the United States Constitution is well established. *Boyd* v. *U. S.*, 116 U.S. 616.

The facts in this case show that the Alcohol Tax Unit Agents had ample and reasonably adequate opportunity to obtain a search warrant but failed to do so. The search complained of was not made incident to an arrest or under any grave emergency, but was made while petitioner and his entire family were absent from the premises.

The facts in this case call for the application of the Rules of Law as set out in the above decisions. The protection of the Fourth Amendment extended to the stationary structure or "cave" searched. Evidence secured by a search, without a valid search warrant, of a stationary structure, upon petitioner's ranch should have been suppressed. The failure of the Circuit Court to so hold is in conflict with the cases cited, *supra*.

Petitioner asserts that his Constitutional rights and immunities guaranteed by the Fourth and Fifth Amendments to the United States Constitution have been violated by an illegal search, and a failure to suppress evidence so

obtained. The decision of the Circuit Court, of which review is sought, is in conflict with applicable decisions of the Supreme Court of the United States concerning an important question of Federal Law, namely, the extent and scope of the protections afforded a citizen by the Fourth Amendment to the Constitution of the United States. A clear pronouncement by this Court that the protections of the Fourth Amendment against unreasonable search and seizure extend to a stationary structure, unlimited by consideration of curtilage, and clearly defining the protections afforded by said Amendment would eliminate confusion and conflicting interpretations of the protection afforded by the Fourth Amendment and is necessary for the protection of petitioner's constitutional rights.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

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Attorneys for Petitioner.

March 28, 1956.

I hereby certify that on the 28th day of March 1956, I mailed two copies of the Petition, postage pre-paid to the Solicitor General of the United States at his office in Washington, D.C., and a copy, postage pre-paid to Mr. Paul W. Cress, United States Attorney, Oklahoma City, Oklahoma.

CHARLES HILL JOHNS.